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No. 02-440

In The
Supreme Court of the United States

ITZHAK SHALOM and DAVID MORDEHAI,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Harvey M. Stone
SCHLAM STONE & DOLAN
A Limited Liability Partnership
26 Broadway
New York, New York 10004
(212) 344-5400
Counsel of Record for
Amicus Curiae

Joshua L. Dratel
LAW OFFICES OF JOSHUA L. DRATEL
14 Wall Street
New York, NY 10005
(212) 732-0707
Of Counsel for
Amicus Curiae

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INTEREST OF *AMICUS*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is the preeminent bar association in the United States advancing the mission of criminal defense lawyers to ensure justice for persons accused of crime or other misconduct. Founded in 1958, NACDL has over 10,000 direct members and over 80 state and local affiliate organizations with 28,000 members. NACDL's members include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges. The American Bar Association recognizes NACDL as an affiliate organization and grants it full representation in its House of Delegates.

NACDL promotes study and research about issues of criminal justice. It also tries to promote fairness in criminal proceedings. In furtherance of that objective, over the last decade NACDL has filed some ten *amicus* briefs per year with this Court.

NACDL members regularly litigate cases involving the issues presented here -- whether, and to what extent, acquitted conduct may increase a sentence -- and have an intimate knowledge, based on practical experience, of the pervasive impact of these issues on criminal justice in the federal courts.

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1 Pursuant to S.Ct. Rule 37.6, counsel certifies that no counsel for any party authored any part of this brief; and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of this brief.

Pursuant to S.Ct. Rule 29.6 on Corporate Disclosure Statements, NACDL is a nonprofit corporation. It has no parent corporation; it is not a publicly held corporation; nor does a publicly held company own 10% or more of its stock.

The parties have consented to the filing of this *amicus* brief on petitioners' behalf. The letters of consent are filed with this brief.

SUMMARY OF ARGUMENT

This case presents constitutional issues of enormous importance. Petitioners, although acquitted by a jury on 17 of 19 counts of transporting stolen goods in interstate commerce (18 U.S.C. § 2314), were sentenced exactly as if the jury had found them guilty on all 19 counts. The district court at sentencing found that the prosecution had established "by a preponderance of the evidence during the trial" that petitioners had committed the acts alleged in the 17 counts on which they stood acquitted. With respect to the two substantive counts (and the related conspiracy count) on which petitioners were found guilty, the value of the goods was under $40,000. But in calculating the total loss under *Sentencing Guidelines* § 2B1.1.(b)(1), the district court added up the value of the goods on all 19 stolen-property counts. This yielded a "total loss" exceeding 1.5 million dollars and a stunning increase in the sentence of incarceration.

This result is inconsistent with recent decisions of this Court prohibiting punishment "exceeding the maximum [the defendant] would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi v. New Jersey,* 530 U.S. 466, 483 (2000). *See Harris v. United States*, 122 S.Ct. 2406, 2417 (2002); *Ring v. Arizona*, 122 S.Ct. 2428 (2002). Here, the sentencing court not only went beyond the facts reflected in the jury's verdict, but actually made and relied on findings contrary to that verdict.

Additionally, because this led to a dramatic increase in the sentence, the facts here present in stark relief the issue explicitly reserved by this Court in *United States v. Watts*, 519 U.S. 148, 156 (1997) -- "whether, in extreme

circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence." This Court's more recent decisions in *Apprendi, Harris* and *Ring*, we submit, have eroded the majority's *per curiam* holding in *Watts*. And even the majority in *Watts* made clear that its decision did not address the sort of "exceptional circumstances" (519 U.S. at 157) presented here.

The issues presented in this case are manifestly important and recurring.

ARGUMENT

We agree with the reasons for granting the writ as set forth in the petition for certiorari, and add only a few brief comments on the vast importance of this case to criminal justice.

1. The issues here loom large in most, if not all, criminal cases. The prevalent practice of prosecutors, for obvious strategic reasons, is to have indictments drawn up with multiple counts. When these cases go to trial and the jury finds guilt on one or more counts and acquits on one or more counts, the issues raised here will likely rear their heads. These issues can and will recur whenever the prosecutor, moved by a sense of duty or frustrated by partial acquittals, asks the sentencing judge to consider the acquitted conduct; or the Department of Probation raises those issues in the Presentence Report; or the sentencing court decides to raise them *sua sponte*. As Justice Kennedy said of the issue decided summarily in *Watts*, the question is "of recurrent importance in hundreds of sentencing proceedings in the federal criminal system." 519 U.S. at 170 (dissenting opinion).

2. The issue reserved in *Watts* and so clearly presented here, where the acquitted conduct had a draconian impact on the sentence, will also recur.

3. The threat of enhancing a sentence based on allegations rejected by the jury will further deter defendants from going to trial, particularly if, as here, the law allows radical increases on a mere "preponderance of the evidence" standard. The *Federal Sentencing Guidelines*, effective as of November 1, 1987, have already altered the adversarial balance of power in criminal cases. Among other things, the *Guidelines* greatly reduced the percentage of cases where a defendant chooses to risk trial. In 1986, the last year before the *Guidelines* regime commenced, 16% of federal defendants against whom charges were not dismissed went to trial. In 2001 only 6% did so, a drop of 61%.[2] *Sourcebook of Criminal Justice Statistics Online*, Table 5.21 (visited Sept. 20, 2002) <http://www.albany.edu/sourcebook/1995/pdf/t521.pdf>.

As the largest organization of criminal defense lawyers, we foresee an added drop in the

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2 In the intervening years, there has been a smooth downward trend in these percentages:

1986	1987	1988	1989	1990	1991	1992	1993
16%	15%	16%	16%	16%	15%	14%	12%

1994	1995	1996	1997	1998	1999	2000	2001
11%	10%	9%	8%	8%	6%	6%	6%

Id.

percentage of defendants willing to go to trial if the law applied by the lower courts in this case is allowed to stand.

4. The sentencing doctrine applied here inevitably embitters defendants toward the criminal justice system. A result so seemingly unfair, so counterintuitive, can never be digested by the individual defendant who experiences it. And the defense lawyer is left with the impossible task of explaining to his client that, despite the jury's acquittal on multiple counts, there is no difference for sentencing purposes -- the thing that counts the most -- between an acquittal and a guilty verdict.

Recognizing this disquieting anomaly, some Justices of this Court have recently expressed their growing concern over the disturbing results in cases less extreme, in our view, than this one. *United States v. Watts*, 519 U.S. at 164 ("In my judgment neither our prior cases nor the text of the statute warrants this perverse result") (Stevens, J., dissenting); *see Ring v. Arizona*, 122 S.Ct. at 2445 ("accelerating propensity" to "increase punishment beyond what is authorized by the jury's verdict" shows that "our people's traditional belief in the right of trial by jury is in perilous decline") (Scalia, J., concurring). *See also, United States v. Watts*, 519 U.S. at 163-64, n.3. (and cases cited therein). As the Second Circuit stated in *United States v. Conception*, 983 F.2d 369, 389, 396 (C.A.2, 1992), "A just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal" (Newman, C.J., concurring).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Harvey M. Stone
SCHLAM STONE & DOLAN
A Limited Liability Partnership
26 Broadway
New York, New York 10004
(212) 344-5400
Counsel of Record for Amicus Curiae

Joshua L. Dratel
LAW OFFICES OF JOSHUA L. DRATEL, P.C.
14 Wall Street
New York, New York 10006
(212) 732-0707
Of Counsel for Amicus Curiae

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